IN THE

Supreme Court of the United States

1968 TERM

No. 1272

RAYMOND SHEAFFER, ET AL., *Petitioner*

v.

WAREHOUSE EMPLOYEES UNION, LOCAL 730, ETC., *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ALBERT J. AHERN, JR.
1200 - 18th Street, N. W.
Washington, D. C.
296-2260

JOHN K. PIDGEON
723 Washington Building
Washington, D. C.
393-4000

Attorneys for Petitioner

CONTENTS

	Page
Opinions	1a thru 12a
Jurisdiction	1
Question Presented	2
Statutes and Rules Involved	2
Statement	2 & 3
Summary of Argument	3
Argument	4 thru 8
Conclusion	7 & 8
Appendix	1a thru 12a

CASES

Link v. Wabash RR Co., 370 U.S. 626, 87 S. Ct. 1386	2, 3, 4, 6, 7, 10a
Gill v. Stolow, 240 F. 2d 669	7
Becker v. Safelite Glass Corp., 244 Fed. Sup. 625 (1965)	7
United States v. Myers, 389 FRD 194	7
Sandee Mfg. Co. v. Rohm and Haas Co., 298 F. 2d 41 (7th Cir. 1962)	7, 11a
Leong v. Railroad Transfer Service, Inc., 302 F. 2d (555) (1962)	7
Rankin v. Shayne Bros., Inc., 280 F. 2d 55	7
Slavitt v. Meader, 107 U.S. App. D.C., 278 F. 2d 276 (1960)	10a, 11a
Dyotherm Corp. v. Turbo Machine Co., 392 F. 2d 146 (3d Cir. 1968)	10a
Kenney v. California Tanker Co., 381 F. 2d 775 (3d Cir. 1967), cert. denied, 390 U.S. 904 (1968)	10a
Barger v. Baltimore & Ohio RR., 75 U.S. App. D.C. 367, 130 F. 2d 401 (1942)	10a
Shotkin v. Westinghouse Electric & Mfg. Co., 169 F. 2d 825 (10th Cir. 1948)	11a

Page

Taub v. Hale, 355 F. 2d 201 (2d Cir.), cert. denied, 384 U.S. 1007 ..... 11a

Pearson v. Dennison, 353 F. 2d 24 (9th Cir. 1965) 11a

Deep South Oil Co. of Texas v. Metropolitan Life Insurance Co., 310 F. 2d 933 (2d Cir. 1962) 11a

Darlington v. Studebaker Packard Corp., 261 F. 2d 903 (7th Cir. 1959) cert. denied 359 U.S. 992 ..... 11a

Gorsuch v. Provident Security Life Insurance Co., 392 F. 2d 200 (9th Cir. 1968) 11a

Garden Homes, Inc. v. Mason, 249 F. 2d 71 (1st Cir. 1957), cert. denied 356 U.S. 903 (1958) 11a

Sweeney v. Anderson, 129 F. 2d 756 (10th Cir. 1942) .. 11a

United States v. Chas. Kurz Co., 396 F. 2d 1013 (C.C.P.A. 1968) 11a

IN THE

Supreme Court of the United States

1968 TERM

No. ..... MISCELLANEOUS

RAYMOND SHEAFFER, ET AL., *Petitioner*

v.

WAREHOUSE EMPLOYEES UNION,
LOCAL 730, ETC., *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINION BELOW

The opinion of the Court of Appeals is unreported as of this time. A copy is attached to this Petition.

JURISDICTION

The judgment of the Court of Appeals was entered on January 23, 1969. The jurisdiction of this Court rests on 28 U.S.C., 12541(1).

QUESTION PRESENTED

Did not the action of the trial judge, affirmed by the Court of Appeals, deny the petitioner due process of law and involve an extension and misconstruction of this Court's decision in *Link* v. *Wabash R.R. Co.*, 370 U.S. 626, 87 S. Ct. 1386, when the Court dismissed for want of prosecution under Rule 41(b) of the Rules of Federal Civil Procedure, a case which had been completely pre-tried and was 24 hours away from trial on the merits at the time the order was signed?

STATUTES OR RULES INVOLVED

Rule 41(b) of the Rules of Federal Civil Procedure Local Rule 13(a) of the United States District Court for the District of Columbia Fifth Amendment to the Constitution

STATEMENT OF THE CASE

Petitioner filed a complaint against the respondent seeking compensatory and punitive damages under § 303 of the Taft-Hartley Act and under the common law of the District of Columbia for malicious interference with contractual relations and personal property. An answer was filed to the complaint; ultimately all discovery procedures were completed; the case was pre-tried; and a trial date was set in the Assignment Office for January 9, 1968. The respondent appealed to the United States District Court from the action of the pre-trial commissioner, who overruled his Motion to Dismiss for Want of Prosecution, the respondent contending in his motion that a Certificate of Readiness, which was filed by the petitioner pursuant to Local Rule 13(a) of the United States District Court for the District of Columbia, was filed on November 6, 1967 instead of November 1, 1967. (See Certificate of Readiness filed Nov. 6, 1967) The matter came on for

hearing before the District Court on January 5, 1968, four days before the case was to be tried on its merits, (Tr. 1-25 Jan. 23, 1968) The trial judge granted the Motion to Dismiss, commenting on the long delays that take place in the trial of cases. Petitioner filed a Motion to Vacate on January 8, 1968, setting forth the entire history of the case. An affidavit of an official in the Assignment Office in support of the motion established that the January 9, 1968 trial date was the first trial date ever assigned to the case. (Affidavit filed Jan. 8, 1968) The trial judge overruled the Motion to Vacate and proceeded to review the entire history of the case, to support the action taken by him in dismissing the case for want of prosecution 24 hours before its trial on the merits. Opinion of Trial Ct. (App. 1a-7a). Appeal was timely filed to the United States Court of Appeals, which affirmed the opinion of the trial judge on January 23, 1969. (App. 8a-11a)

SUMMARY OF ARGUMENT

This case involves the denial of due process to the petitioner and a flagrant violation of Rule 41(b) of the Rules of Federal Civil Procedure and a misconstruction of this Court's decision in *Link* v. *Wabash R.R. Co., supra,* wherein this cause was dismissed for want of prosecution 24 hours before it was to be tried on the merits.

This appeal involves the application of Local Rule 13(a), which requires a litigant to file a form called a Certificate of Readiness. The form which was filed five days late on November 6, 1967 and which gave rise to this proceeding has, we suggest, resulted in a severe miscarriage of justice to the petitioner. The record in this case discloses further that the action of

the trial judge and the Court of Appeals is wholly unsupported under *Link* v. *Wabash R.R. Co.* since there was no prejudice to the respondent in this case because of the fact that the respondent filed no list of witnesses pursuant to the pre-trial order and was thus precluded from calling witnesses at trial. Thus the only adverse effect on the memory of witnesses referred to by the trial judge would be to the petitioner in the presentation of his case.

ARGUMENT

The petitioner was denied due process of law by the action of the trial judge in dismissing his case for want of prosecution 24 hours before it was to be tried on the merits in Court.

The Court of Appeals has affirmed the action of the District Court, holding it was not an abuse of discretion when the trial judge, as stated above, dismissed the case for want of prosecution 24 hours before it was to be tried on the merits. The trial judge filed an extensive opinion in denying the Motion to Vacate his action (App. 1a-7a), in which he sought to set out the entire history of the case showing past dilatory acts by the petitioner without seeking to establish the equally dilatory acts by the respondent in the orderly pretrial preparation of this case.

Be that as it may, and however Courts throughout the country and in the District of Columbia may be uneasy about the delays that result in the processing of justice, the invocation of this Local Rule 13(a) by the District judge overruling the pre-trial commissioner who had recommended the case go forward to trial, is not the way either to dispense justice or clear the Court docket. The right of a litigant to have his case

tried on the merits is a basic one and should be abrogated by no one under local or technical rules, such as was involved in this case where the defect which gave rise to the proceeding which ultimately ended in the dismissal of this case, was the tardiness of the petitioner by some five days in filing his Certificate of Readiness.

We suggest to the Court that the trial judge recognized the indefensible position of his initial action in dismissing the case for want of prosecution, and in the opinion denying the Motion to Vacate, (App. 1a-7a) he proceeded to look at the entire history of the case in order to support his action. While we feel this was not proper, even a search of the entire history of the case did not support the action taken by the trial judge when the case was 24 hours away from trial on the merits.

The Court of Appeals in affirming the case and in holding the trial judge did not abuse his discretion, stated that the trial judge had a right to review the entire record of the proceeding, even though procedurally the only matter that was before the trial judge was what punishment, if any, should be inflicted on the litigant for the five-day tardy filing of his Certificate of Readiness. Assuming the correctness of this ruling of law by the Court of Appeals, the fact of the matter is that a search of the entire record shows as many dilatory acts by the respondent as by the petitioner and the opinion fails wholly to take into consideration that since the respondent had filed no list of witnesses under the pre-trial order, the major prejudice that incurred from delay in bringing the case to trial was suffered by the petitioner.

Other actions outlined (App. 1a-4a) of the opinion relating to the fact that the petitioner did not file his case until August, 1962 when the tort occurred in 1961, is wholly irrelevant since a plaintiff has the right anytime within the period of the statute of limitations to file his action; and in this case an ascertainment of the damages could not be readily obtained.

In *Link* v. *Wabash R.R. Co.,* over the dissents of the Chief Justice and Justice Douglas and Black, this Court went as far as any prior decision of this Court in affirming a dismissal of an action for failure of his counsel to abide by Court rules. In that case there was actually a failure of the trial counsel to show up at a pre-trial conference. There is no similarity between the case and the present one. Here all of the procedures had been completed; the pre-trial commissioner had recommended that the matter go to trial; and the assignment commissioner had set a trial date of January 9, 1969.

The Court of Appeals speaks in its opinion about the delays in getting cases to trial, and certainly there are delays, some of which may be attributed to counsel, some of which may be attributed to the Court, and some of which may just inhere in the process of administering justice itself. Whatever may be the sensitivity of Courts in the District of Columbia elsewhere or everywhere to the fact that long delays are necessitated before cases are tried on the merits, the invocation of local rules, in this case Local Rule 13(a), to dismiss a case 24 hours before it is to be tried on the merits, may clear the docket of a case but it does justice to no one—neither the petitioner, the respondent, nor the Court. We think the language of Mr.

Justice Black, dissenting in *Link* v. *Wabash R.R. Co.,* has direct application to this factual situation:

> "It is true that by its ruling today the Court finally puts an end to this case, and thus clears it from all federal dockets; but in view of the fact that the merits of the case have never been reached, I cannot believe that there should be too much rejoicing at this fact. The end result of the procedures adopted here has been that much time has been wasted and yet no justice has been done."

The trial judge committed an abuse of discretion in dismissing the case initially and a further abuse of discretion in failing to set aside the dismissal when petitoner had moved pursuant to Rule 60(b) of the Rules of Federal Civil Procedure. See *Gill* v. *Stolow,* 240 F. 2d 669; *Becker* v. *Safelite Glass Corp.,* 244 Fed. Sup. 625 (1965); *United States* v. *Myers,* 38 FRD 194; *Sandee Mfg. Co.* v. *Rohm and Haas Co.,* 298 F. 2d 41; *Leong* v. *Railroad Transfer Service, Inc.,* 302 F. 2d (555) (1962); and *Rankin* v. *Shayne Bros., Inc.,* 280 F. 2d 55.

The petitioner was denied due process of law and has been denied his day in Court when that day was 24 hours away. There was an abuse of discretion, a misconstruction of this Court's ruling in *Link* v. *Wabash R.R. Co.,* and this Court should grant the Writ of Certiorari.

CONCLUSION

This case presents a very serious issue to this Court. It involves the petitioner being denied his day in Court, 24 hours before it was to be heard on its merits and where the Court of Appeals has allowed the action to stand, holding that it did not constitute an abuse of

discretion. It has cleared a case from the docket in time where Court delay is a subject of much discussion. Whatever may be the injustice of delays in litigation, the action taken here on the facts of this case is wholly unwarranted and denied petitioner due process of law.

ALBERT J. AHERN, JR.
1200 - 18th Street, N. W.
Washington, D. C.
296-2260

JOHN K. PICKENS
723 Washington Building
Washington, D. C.
393-6900.

Attorneys for Petitioner